No. 14668

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MARGARET D. SHORT, AS ADMINISTRATRIX OF THE ESTATE OF ETHEL GRACE SHORT, DECEASED, APPELLEE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from judgment entered on October 6, 1954 by the District Court for the Northern District of California, Southern Division, granting injunctive and declaratory relief to the plaintiff-appellee. This action was brought in June, 1952 by the appellee, administratix of the estate of a principal beneficiary under a National Service Life Insurance policy, seeking a declaration that she was entitled to certain insurance proceeds that had become payable to appellee's decedent during her lifetime but had not been paid. Placed in issue was the validity of § 8.91(b) of the Regulations of the Veterans Administration (38 C. F. R. 8.91(b) (1949)) which provides that in the circumstances of this case payment should be made to the contingent beneficiaries rather than to the estate of the principal beneficiary. The jurisdiction of the District Court was founded upon § 617 of the National Service Life Insurance Act of 1940, as amended, 54 Stat. 1014, as amended, 38 U. S. C. 817; and upon § 19 of the World War Veterans' Act of 1924, as amended, 43 Stat. 607, as amended, 38 U. S. C. 445. This Court's jurisdiction rests upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

Irving Ritchie Short, while in the Army during World War II, was issued a National Service Life Insurance policy in the face amount of $10,000, effective January 1, 1943 (R. 52). The policy remained in effect until Short's death in 1950. On August 25, 1949 the insured changed the beneficiaries of that policy, naming his mother Mrs. Ethel G. Short, appellee's decedent, as principal beneficiary, and his brother James Harvey Short, and the Berkshire Industrial Farm, a charitable institution, as contingent co-beneficiaries (R. 53, 100). However, at no time did the insured select any form of payment to be made to the beneficiaries (R. 53).

Insured died on August 30, 1950 in an Army hospital in Tokyo, Japan after having been honorably discharged from service (R. 52, 54). He had come to Japan from Formosa to undergo physical examinations prior to being recalled into active service as a commissioned officer. Upon being examined he was found to be suffering from acute poliomyelitis and was immediately hospitalized but died a few days after admittance (R. 55).

In September of 1950, shortly after her son's death, Mrs. Short, the principal beneficiary, filed a claim with the Veterans Administration seeking payment of the policy in question (R. 60). In response to letters from Mrs. Short and her attorneys, the Veterans Administration informed Mrs. Short's attorneys in December of 1950 that certain evidence was needed before processing of the claim could begin (R. 63). Subsequently Mrs. Short's attorneys were notified on several occasions that no action could be taken on any claim for proceeds under Irving R. Short's policy until an official report of death was received from the appropriate Government Department and that some difficulty was being encountered because of uncertainty as to the status of the deceased at the time of his death; *i.e.*, whether or not he had yet reentered the service (R. 64-66).

The official report of death was finally received from the State Department on July 3, 1951, but in the meantime Mrs. Short had died on June 14, 1951 (R. 70). Thereupon, the Veterans Administration informed Mrs. Short's attorneys that according to its regulations it had no choice but to pay the proceeds of the policy, including those installments that had accrued after the insured's death but before the death of Mrs. Short, to the designated contingent co-beneficiaries (R. 70). A ruling to that effect was made by the Director of Dependents and Beneficiaries Claims Service on November 29, 1951 and on May 2, 1952 that ruling was affirmed by the Board of Veterans Appeals (R. 30).

This suit was then brought by Mrs. Short's administratix, the appellee in this case, (R. 3-32), and a stipulated statement of facts was filed (R. 51-71). The District Court issued an opinion in August, 1954 ordering entry of judgment for the principal beneficiary's estate in the amount of the insurance benefits which were accrued but unpaid prior to Mrs. Short's death upon the ground that the Veterans Administration regulation which "specifically covers the case"

(R. 75) was not supported by the Act (R. 71). Judgment was entered on October 6, 1954 (R. 102-103), and the United States and appellant James Harvey Short, administrator of the estate of the insured, then appealed (R. 105).[1]

QUESTIONS PRESENTED

1. Whether a regulation of the Veterans Administration must be given effect by the courts if it is not inconsistent with the National Service Life Insurance Act and is necessary or appropriate to carry out its purposes, notwithstanding that the regulation may be "legislative" in nature.

2. Whether § 8.91(b) of the Veterans Administration Regulations—providing that insurance installments accrued but unpaid to a deceased principal beneficiary not entitled to lump-sum settlement should be paid to the contingent beneficiary—is inconsistent with § 602(u) of the Act.

3. Whether § 8.91(b) of the Veterans Administration Regulations is necessary or appropriate to carry out the purposes of the Act.

STATUTE AND REGULATION INVOLVED

Section 602(u) of the National Service Life Insurance Act of 1940, as added by § 9 of the Act of August 1, 1946, 60 Stat. 781, as amended by the Act of May 23, 1949, 63 Stat. 74, 38 U. S. C. 802(u), provides:

> With respect to insurance maturing on or subsequent to August 1, 1946, in any case in which the beneficiary is entitled to a lump-sum settlement but elects some other mode of settlement and dies before receiving all the benefits due and payable un-

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[1] The administrator of the insured's estate contended that he was entitled to the entire $10,000, but the court found against him, see pp. 13-17, *infra*.

der such mode of settlement, the present value of the remaining unpaid amount shall be payable to the estate of the beneficiary; and in any case in which no beneficiary is designated by the insured or the designated beneficiary does not survive the insured, or a designated beneficiary not entitled to a lump-sum settlement survives the insured, and dies before receiving all the benefits due and payable, the commuted value of the remaining unpaid insurance (whether accrued or not) shall be paid in one sum to the estate of the insured: *Provided,* That in no event shall there be any payment to the estate of the insured or of the beneficiary of any sums unless it is shown that any sums paid will not escheat.

2. Section 8.91(b) of the Regulations of the Veterans Administration, 13 F. R. 7108, 38 C. F. R. 8.91(b) (1949) provides:

> If the principal beneficiary of National Service life insurance maturing on or after August 1, 1946, does not survive the insured or if the principal beneficiary not entitled to a lump-sum settlement survives the insured but dies before payment has commenced, the insurance shall be paid to the contingent beneficiary in accordance with the provisions of § 8.77.

SUMMARY OF ARGUMENT

I

Although the court below recognized that the Veterans Administration regulation requiring payment of the disputed proceeds to the designated contingent beneficiary "specifically covers the case," it refused to follow that regulation. It did so because it held the regulation to be unsupported by the Act, "legislative" rather than "interpretive," and therefore invalid. This is an erroneous standard for judicial review of Veterans Administration regulations. The Supreme Court clearly ruled in *United States* v. *Zazove,* 334 U. S. 602, that a Veterans Administration insurance regulation must be upheld and given effect by the courts if it is not inconsistent with the National Service Life Insurance Act of 1940 and is necessary or appropriate to carry out the purposes of that Act.

II

The regulation in question could not be inconsistent with the Act because the only section of the Act relating to payment of proceeds after the death of a designated beneficiary was not intended to cover this particular fact situation. The legislative history of the Act and its general purposes reinforce the view that Section 602(u), which requires that accrued unpaid proceeds be paid to the estate of the insured when a "designated beneficiary" dies before receiving any payment, was intended to apply only when no beneficiary, contingent or principal, is still living. This was the view adopted by the court below and we agree with that view.

The regulation adopted by the Veterans Administrator carries out the broad purposes of the National Service Life Insurance Act of 1940 and the putative intent of the average policyholder by preferring living beneficiaries to the estates of decedents. This favors the natural objects of a policyholder's bounty rather than a deceased beneficiary's creditors or heirs in whom the policyholder might have little or no interest. It is therefore clearly necessary and appropriate to carry out the purposes of the Act.

Although the delay in processing Mrs. Short's claim is regrettable, it was unavoidable, being caused by confusion as to the status of Irving Short engendered by his death in an Army hospital while being examined prior to recall from the Reserves into active service but before his actual entry into that service. The Supreme Court has said on several occasions that such delay cannot affect construction of regulations or statutes.

ARGUMENT

The court below ruled that the estate of a principal beneficiary of National Service Life Insurance, not entitled to a lump-sum settlement,[1a] was entitled to receive those installments of insurance proceeds that had accrued but had not been paid before her death. This ruling was made in the face of a clear regulation of the Veterans Administration (§ 8.91(b), 38 C.F.R. 8.91 (b) (1949) providing that these accrued but unpaid proceeds be paid to the contingent beneficiary. The court admitted that "the regulation specifically covers the case" (R. 75), but refused to follow it on the ground that the regulation was not supported by the statute. We shall show first that the district court employed an erroneous standard in declining to follow the regulation and, second, that the regulation is supported by the statute and is therefore fully valid and dispositive of this case.

[1a] As will be explained *infra*, p. 21, the 1940 Act permitted payment of National Service Life Insurance proceeds on the installment plan only; however in 1946 the Act was amended to permit lump-sum settlements in certain circumstances.

I

The Courts Must Follow Insurance Regulations of the Administrator If Those Regulations Are Not Inconsistent with the Act and Are Necessary or Appropriate to Carry Out Its Purposes.

A. *The Court Below Employed An Erroneous Standard In Determining the Validity of Section 8.91 (b) of the Veterans Administration's Regulations.*

There is no question that an administrative regulation promulgated within the authority granted by statute has the force of law and will be given full effect by the courts. *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Rosen* v. *United States,* 245 U.S. 467; *Ex Parte Reed,* 100 U.S. 13; *Gratiot* v. *United States,* 45 U. S. (4 How.) 80; *Carter* v. *Forrestal,* 175 F. 2d 364 (C.A.D.C.), certiorari denied, 338 U.S. 832.

It is also a familiar principle that a consistent administrative construction "is entitled to great weight, 'and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.' *United States* v. *Jackson,* 280 U.S. 183, 193." *United States* v. *Citizens Loan & Trust Co.,* 316 U.S. 209, 214; *United States* v. *Madigan,* 300 U.S. 500, 505. This general rule, of course, "has peculiar weight when it involves a contemporaneous construction of a statute by men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315; *Adams* v. *United States,* 319 U.S. 312, 314-315; *United States* v. *American Trucking Assns., Inc.,* 310 U.S. 534, 549.

The forerunner of Section 8.91(b) of the Regulations of the Veterans Administration was Section 10:3491, 13 F.R. 2584, which was promulgated in May 1948. That regulation, as this one, construed the statute as requiring that accrued but unpaid proceeds, such as those here in question, be paid to the contingent beneficiary. Thus, for 7 years this same construction of the 1946 amendments has been consistently followed by the "men charged with the responsibility of setting [the Act's] machinery in motion." And even before the 1946 amendments, Section 602(h)(3) of the 1940 Act, (54 Stat. 1009, 1010, 38 U.S.C. 802(h)(3)) which provided for the disposition of installments unpaid to deceased beneficiaries was interpreted as applying to those unpaid installments that had accrued as well as to the installments not yet accrued. See *e.g.*, § 10:3449, 6 F.R. 1162.

Despite the judicial tradition of deferring to longstanding administrative construction, the District Court refused to accept the regulation, apparently being of the view that the regulation would be binding upon the court only if it was "interpretive" of the statute, but that if it was "legislative" in nature, it must fall (R. 75). Whatever be the correctness of that standard as applied to other administrative regulations, it clearly does not apply to the regulations of the Veterans Administrator. This is so at least partly because of the broad statutory grant of power to the Administrator to "determine and publish the terms and conditions of [National Service Life Insurance]," Sec. 602(o), 54 Stat. 1009, 1011, 38 U.S.C. 802(o), and to "make such rules and regulations, not inconsistent with the provisions of this part, as are necessary or appropriate to carry out its purposes." Sec. 608, 54 Stat.

1009, 1012, 38 U.S.C. 808. *United States* v. *Zazove,* 334 U.S. 602, 611. Moreover, the practice is well-established in the federal courts of deferring to the judgment of the Veterans Administrator in matters dealing with the administration of veterans' insurance. *United States* v. *Citizens Loan & Trust Co.,* 316 U.S. 209; *United States* v. *Madigan,* 300 U.S. 500; *Horton* v. *United States,* 207 F. 2d 91 (C.A. 5), certiorari denied, 346 U.S. 903; *Cleveland* v. *United States,* 201 F. 2d 398 (C.A. 6); *Jones* v. *United States,* 189 F. 2d 601 (C.A. 8); *United States* v. *Snyder,* 177 F. 2d 44 (C.A.D.C); *Hicks* v. *United States,* 65 F. 2d 517 (C.A. 4); *Claffy* v. *Forbes,* 280 Fed. 233 (C.A. 9).

The chief cause for the error of the District Court lies in its analysis of this case as if it were one involving commercial insurance. The court began with the assumption that a beneficiary's right to receive insurance proceeds vests upon the death of the insured, which is the usual commercial rule, and then it searched for reasons why this rule should not apply here (R. 78-81). Finding none it granted judgment for the estate of the principal beneficiary. But National Service Life Insurance is not commercial insurance. No matter how the 1946 amendments broadened the Act (and we will examine *infra* how these amendments liberalized the Act) it is still statutorily created Government insurance and must be so considered when judicially reviewed. This principle was succinctly stated by the Supreme Court in *United States* v. *Zazove,* 334 U.S. at 610:

> There is, of course, a marked distinction between the criteria for judicial construction of an ordinary commercial insurance contract, and construction of the provisions of an act of Congress set-

ting up a system of national life insurance for servicemen to be administered by a governmental agency. The statutory provisions, where ambiguous, are to be construed liberally to effectuate the beneficial purposes that Congress had in mind. In this respect, judicial construction of the statute may appear similar to construction of a commercial policy, where ambiguous provisions are generally construed in favor of the insured.* * * But the statute is an expression of legislative intent rather than the embodiment of an agreement between Congress and the insured person. Only the intent of Congress, which, in this case is the insurer, need be ascertained to fix the meaning of the statutory terms; the layman understanding of the policy holder does not have the relevance here that it has in the construction of a commercial contract.

B. *United States* v. *Zazove, 334 U. S. 602, Which Sets Forth the Correct Standard for Review of Veterans Administration Regulations Under the 1940 Act, Supports the Government's Position in This Case.*

The Supreme Court carefully explained in *United States* v. *Zazove,* that, in reviewing insurance regulations of the Administrator, courts must examine the pertinent section of the Act in relation to the Act's other sections and in relation to its legislative history for the purpose of determining "whether the regulation is 'not inconsistent' with the provisions of the Act and whether it is 'necessary or appropriate to carry out its purposes.' " 334 U.S. at 612. The court went on in that case to uphold the regulations of the Veterans Administration governing the payment of annuities. As the court below stated (R. 75), "The Veterans' Administration regulations involved in Zazove were reviewed as if the regulations were interpretive. They more closely approached legislative regulations than the regulation involved in this case." In view of this observation, it is difficult to understand how the court could have made the decision it did consistent with the *Zazove* case.

However, the trial court quoted language from *Zazove* that Veterans Administration regulations are "not automatically to be deemed valid merely because not plainly interdicted by the terms of the particular provisions construed." The court apparently read this language as leaving it within its discretion whether or not to follow the regulation, and if this had been so, then the opinion that was written would not have been an unreasonable one.

But as the Supreme Court has emphasized, where a regulation covers a case before the courts, the decision to be made is not the same as if the case were an original question. The regulation must be given effect unless it is inconsistent with the Act or not necessary or appropriate to carry out its purposes. In this case the question of disposing of these approved but unpaid proceeds had already been raised and answered by the Administrator in his capacity as rulemaker for National Service Life Insurance. It was in failing to give due consideration to that regulation, in failing to examine it according to the standards laid down by the Supreme Court, that the district court erred.

II

Section 8.91(b) of the Veterans Administration Regulations, Which Was Followed by the Administrator in This Case, Controls Disposition of the Proceeds in Question.

Focusing attention on the particular facts of this case and upon the legal principles necessary to resolve this dispute, it is well to remember that the issue at bar is a simple one. The representative of the insured, the representative of the principal beneficiary (the insured's mother), who was not entitled to a lump-sum settlement under the Act, and the contingent co-beneficiaries (the insured's brother and a charitable institution catering to unfortunate boys), so designated by the insured, each claim the right to receive that part of the proceeds of the insured's policy (about $2,600) [2] which became payable to the principal beneficiary during her lifetime but which was not paid to her before her death.

The court below decided in favor of the estate of the principal beneficiary. The United States, a defendant in this action and interested in supporting its lawfully promulgated regulations and in carrying out the will of Congress (see *United States* v. *Leverett,* 197 F. 2d 30 (C. A. 5), and *United States* v. *Snyder,* 177 F. 2d 44 (C. A. D. C.)), has appealed because it believes that a lawful regulation of the Veterans Administration—providing that in this kind of case the disputed proceeds should be paid to the contingent beneficiary—should be controlling. We have argued before that if the regulation in question can be shown to be not inconsistent with the Act and also necessary or appropriate to carry out

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[2] Mrs. Short chose to receive 36 equal monthly installments (R. 52). If that option had been approved she would have received $289.90 monthly or a total of about $2,609.10 between her son's death and her own.

its purposes, then the courts must follow that regulation, giving it full effect as if it were part of the statute. In this part of the brief it will be shown that this regulation meets those requirements.

A. *The Statute Is Silent As To Who Is Entitled to the Disputed Proceeds In This Kind of Case and Hence the Regulation Could Not Be Inconsistent With It.*

Section 602(u) of the National Service Life Insurance Act of 1940, as amended, provides that where "a designated beneficiary not entitled to a lump-sum settlement * * * dies before receiving all the benefits due and payable * * * the remaining unpaid insurance (whether accrued or not) shall be paid in one sum to the estate of the insured." If that section had been applicable to this case, then Regulation § 8.91(b) which provides that in these circumstances payment should go to the contingent beneficiary would have been inconsistent with the Act and therefore invalid, and appellant James Harvey Short, executor of the estate of the insured, would have been entitled to the proceeds in question. But the district court found that section inapplicable, and we agree with that conclusion.

The court below concluded that the phrase "designated beneficiary" in Section 602(u) includes contingent as well as principal beneficiaries and that therefore the section applies only where no designated beneficiary, contingent or principal, is still living (R. 77). This is the construction that has been followed by the Veterans Administration since the statute was first enacted, § 10:3489, 11 F. R. 9285, 38 C. F. R. 10:3489 (Supp. 1946), 38 C. F. R. 8.89 (1949), and is the construction inferentially approved in *Washburn* v. *United States,* 63 F. Supp. 224 (W. D. Mo.) where it was held that the phrase "beneficiary" in Section 602(g) of the Act, 54 Stat. 1009, 1010, 38 U. S. C. 802(g), includes contingent as well as principal beneficiaries.[3] This construction is also in keeping with the countless rulings in the field of commercial insurance defining "beneficiary" as anyone entitled to receive proceeds under an insurance policy. See, *e. g., Odom* v. *Prudential Life Insurance Co.,* 173 Ore. 435, 145 P. 2d 480; 29 Am. Jur. § 1271.

If the construction given Section 602(u) by the Veterans Administration and by the court below were overturned and that section were held applicable whenever a designated *principal* beneficiary not entitled to lump-sum settlement survived the insured but died before receiving all payments, even though other designated beneficiaries were still alive, then persons designated by the insured, and therefore presumably objects of his bounty, would be cut off from any of the policy proceeds in favor of the insured's estate. In many cases this would mean that creditors of the insured's estate, expenses of administration, and taxes could take the bulk, if not all, of the insurance money. If a holder of a National Service Life Insurance policy should want such a result, he could designate his own estate as a beneficiary. This has been possible since 1946, § 4, Act of August 1, 1946, c. 728, 60 Stat. 781. Here, however, when the insured last changed the beneficiaries of his policy in August of 1949 (R. 100), he specifically designated his brother and the Berkshire Industrial Farm as contingent beneficiaries, *not* his own estate, thereby making his intention clear that if the principal beneficiary did not survive to receive all the proceeds, then he wished the

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[3] Sec. 602(g) gives to policyholders the right to designate beneficiaries of the insurance. The *Washburn* case decided that this permitted them to designate contingent beneficiaries as well as principal beneficiaries.

remainder to be divided among these contingent beneficiaries. It is therefore, reasonable to assume, as the Veterans Administration and the court below did, that the insured intended that there be a complete failure of beneficiaries before any part of the insurance proceeds should revert to his estate.

If any further support is needed to prove that Section 602(u) does not require payment of the insurance proceeds to the estate of the insured, then it should be noted that since 1948 Congress has known of the construction given to Section 602(u) by the Veterans Administration and has seen fit not to interfere, though it has amended the Act in other particulars since that time. In September 1948 identical letters addressed to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate were sent to the Congress informing them of this Veterans Administration construction and quoting the text of Regulation Section 10:3489 (now 38 C. F. R. 8.89 (1949)).[4] These letters were printed in both committee reports of a suggested amendment (subsequently enacted) to the Act. S. Rept. No. 50, H. Rept. No. 513, 81st Cong., 1st Sess. In these circumstances, Congress's failure to change the regulation legislatively can only be taken as tacit approval. Cf. *Commissioner* v. *Flowers,* 326 U. S. 465,

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[4] That section, in pertinent part, provided as follows:

> If no person is designated beneficiary by the insured, or if the designated beneficiary (*including a contingent beneficiary*) does not survive the insured, or if the designated beneficiary (*including a contingent beneficiary*) not entitled to a lump-sum settlement survives the insured and dies before payment has commenced, the face amount of insurance less any indebtedness shall be paid to the insured's estate in one sum, provided that in no event shall there be any payment to such estate of any sums which, if paid, would escheat. [Italics supplied].

469; *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Missouri* v. *Ross,* 299 U. S. 72, 75.[4a]

Of course, if, as we contend, Section 602(u) of the Act controls only the case where no living designated beneficiary exists then Regulation Section 8.91(b)—which provides for the payment of installments accrued but not paid when the principal beneficiary has died but contingent beneficiaries are still alive—could not possibly be said to be inconsistent with that section. The two provisions are complementary rather than conflicting. Moreover, no other section of the Act relates explicitly or impliedly to the question of how to dispose of insurance proceeds in this fact situation nor have we found anything in the legislative history of the act or its many amendments that deals with this problem—in short, nothing in the Act can be said to be inconsistent with Veterans Administration Regulation Section 8.91(b).

B. *The Regulation Is Necessary or Appropriate to Carry Out the Purposes of the Act*

There being no statutory direction for disposing of insurance proceeds in a case of this kind, payment must be controlled by regulations of the Veterans Administrator promulgated under his broad statutory powers to "determine and publish the terms and conditions of such insurance," § 602(o) of the Act, 54 Stat. 1009, 1011, 38 U. S. C. 802(o), and to "make such rules and regulations, not inconsistent with the provisions of this Act, as are necessary or appropriate to carry out its purposes." § 608, 54 Stat. 1009, 1012, as amended, 38

[4a] For further legislative support see n. 32 in the opinion of the court below (R. 86-8).

U. S. C. 808. We have just showed that Section 8.91(b) of the Regulations is not inconsistent with the Act. *Supra*, pp. 13-17. To establish its validity then, it need only be shown that this regulation "is necessary or appropriate to carry out [the Act's] purposes." *United States* v. *Zazove*, 334 U. S. 602, 611-612. See pp. 11-12, *supra*.

1. *Viewed in "its historical setting,"* [5] *the Act clearly supports § 8.91(b) of the Regulations.* In formulating a regulation to provide for the disposition of accrued but unpaid funds such as these, the Administrator could have chosen any one of 3 possible solutions: (a) the rule that applies when no beneficiaries, contingent or principal, are still living could have been extended to cover this case so that the proceeds would be paid to the estate of the insured; (b) the rule that applies when the principal beneficiary *is* entitled to a lump-sum settlement could have been extended to this case to make the estate of the principal beneficiary entitled to receive the disputed proceeds; or, finally, (c) a new rule could have been established to provide for these special facts and making the award to the contingent beneficiaries who were designated by the insured. The Administrator chose the last of these possibilities, a rule that is not only appropriate to carry out the purposes of the Act, but is probably the most reasonable and appropriate of the three.[6]

The rule promulgated by the Veterans Administrator (Sec. 8.91(b)) is the most suitable because it is tailor-made to the particular fact situation and not dependent upon rules designed for other facts. It is best calcu-

[5] *United States* v. *Henning*, 344 U.S. 66, 72.

[6] It hardly requires proof that any of the three possibilities would be "necessary" to carry out the purposes of the Act. If for no other reason, it would avoid uneven or discriminatory treatment.

lated to carry out the broad purposes of the Act and the general intent of policyholders. Each of the other two alternatives results in benefiting a decedent estate rather than a living beneficiary, a result believed to be contrary to the intent of the average policyholder. National Service Life Insurance policyholders are told in general terms what a beneficiary is when they make a designation (R. 100), and in what circumstances the beneficiaries will take. It has therefore been the standard practice of the Veterans Administration to carry out to the best of its ability any such designation, and it has been assumed that the insured, if he could be asked, would prefer a designated contingent beneficiary to the creditors or heirs of the deceased principal beneficiary in whom the insured might have little or no interest.[7] This assumption is the foundation of Section 8.91(b).

The history of the 1940 Act leaves little doubt that Congress has made the same assumption. From the beginning, the underlying policy of National Service Life Insurance has been to benefit living people, to care for the families and friends of men who were called away to war never to return. In enacting the National Service Life Insurance Act of 1940, the draftsmen had the benefit of experience under the World War Veterans' Act of 1924, 43 Stat. 607, which provided for payment to a beneficiary's personal representative of ac-

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[7] To take a common example, suppose that an insured is married and has no children, he names his wife as the principal beneficiary and his parents or brothers and sisters as contingent beneficiaries. If his wife then dies before receiving any payments, the accrued unpaid installments would, under the construction below, go to her estate and thus to her creditors and heirs, which would be the members of her family. On the other hand, under our construction, the accrued unpaid installments would go to the insured's family as the designated contingent beneficiaries. The latter result is far more in accord with the normal intent of an insured than the result under the construction below.

crued installments of insurance unpaid at the time of his death (Section 26, 28 U. S. C. 451), and to the estate of the insured of the present value of all unmatured installments (Section 303, 38 U. S. C. 514). In view of these express provisions in the 1924 Act for payment to the beneficiary's estate of installments accrued but unpaid, (*McCullough* v. *Smith,* 293 U. S. 228, *Singleton* v. *Cheek,* 284 U. S. 493), which Act was used as a model in drafting the benefit provisions of the 1940 Act (*United States* v. *Zazove,* 334 U. S. 602, 617-19), the omission of similar provisions from the Act of 1940 emphasizes Congress's intention to limit insurance benefits to living beneficiaries.

This same policy can be seen in the Servicemen's Indemnity Act of 1951, 65 Stat. 33, 38 U. S. C. 851, *et seq.* That statute, which awarded free life insurance in the amount of $10,000 to servicemen during the period of military service, again expressly established the principle of permitting payments only to authorized beneficiaries alive to receive them in the following provision (Sec. 3, 38 U. S. C. 852):

> Any installments of an indemnity not paid to a beneficiary during such beneficiary's lifetime shall be paid to the named contingent beneficiary, if any; otherwise, to the beneficiary or beneficiaries within the permitted class next entitled to priority: *Provided,* That no payment shall be made to the estate of any deceased person.

See also S. Rept. No. 91, 82nd Cong., 1st Sess. 8. Reaffirmation of this principle in circumstances comparable to those which surround the National Service Life Insurance Act convincingly evidences deliberate Congressional policy to prefer living people as beneficiaries of Government insurance rather than estates of deceased people.

This policy of preferring the living is so strong that it prompted the Supreme Court to hold in *Henning* v. *United States,* 344 U. S. 66, and *Baumet* v. *United States,* 344 U. S. 82, that the Act required forfeiture to the National Service Life Insurance Fund if no beneficiary was alive, although some lower courts had held otherwise. *United States* v. *Henning,* 191 F. 2d 588 (C.A. 1); *Henning* v. *United States,* 93 F. Supp. 380 (D. Mass.).

The court below concluded, however, that this policy was changed in 1946. It reasoned that since many of the narrow limitations upon National Service Life Insurance contained in the Act of 1940 were removed by the 1946 amendments, the purpose of those amendments was to liberalize the insurance and make it more like commercial life insurance. While this is true in general, a more detailed analysis of the amendments reveals that the Act was broadened in certain particulars but not in others. The broad provisions for payment to personal representatives of beneficiaries that appeared in the 1924 Act, 43 Stat. 614, 38 U. S. C. 451, were not reenacted. Instead, special rules were established only for lump-sum settlements. Until 1946, beneficiaries could be paid only on the installment plan. In § 602(t), § 9, 60 Stat. 781, 38 U. S. C. 802(t), added by the 1946 amendments, policyholders were permitted for the first time to designate a commercial-type lump-sum settlement as one form of payment to the beneficiary. However, beneficiaries are not entitled to this lump-sum settlement unless the insured himself so specifies. And if the insured does choose to permit a lump-sum settlement, nevertheless a beneficiary can select payment on the old-style installment plan basis. Thus the total effect of § 602(t) was to add to the Act a new form of payment while retaining the old installment plans as well.

Section 602(u) was added to provide for disposal of payments that have accrued to a beneficiary entitled to the new type lump-sum settlement but who had not been paid before death. Congress provided that such payments were to be made according to the commercial rule, *i.e.,* that the right to receive the entire lump sum would vest in the beneficiary immediately upon the death of the insured, whether or not the beneficiary had chosen to receive the lump sum, provided only that the beneficiary survive the insured. But Congress carefully distinguished in Section 602(u) between this new rule, which would be applicable only to beneficiaries entitled to receive the new commercial-type lump-sum payment, and the old rule which would continue to apply to those beneficiaries entitled only to the old-style installment payments. The second half of this subsection made plain that beneficiaries not entitled to the lump-sum settlement would not have a vested right to any of the proceeds but that "the remaining *unpaid* insurance *(whether accrued or not)* shall be paid in one sum to the estate of the insured." [Italics supplied.]

We have explained *supra,* pp. 13-17, that this part of Section 602(u) was intended to apply only where no designated beneficiary, contingent or principal, is still living, but it illustrates that the long-standing rule against the vesting of rights to unpaid installments "whether accrued or not" is to remain, except with respect to beneficiaries entitled to the new lump-sum settlement.[8] Thus the second half of Section 602(u) had a dual purpose. First it was designed to retain the pre-1946 policy of permitting no vesting of rights to insurance benefits where the beneficiary was entitled only to installment payments, and second its purpose was to change the pre-1946 rule requiring forfeiture to the Fund of any payments which could not be made to living persons by awarding otherwise forfeitable payments to the estate of the insured. Section 8.91(b) of the regulations furthered the first purpose of continuing the rule against vesting, requiring payment to the contingent beneficiary next in line rather than to any estate. And it may be observed that in this case there is no question of forfeiture—all the insurance proceeds will eventually be paid out—rather the issue here is the choice among beneficiaries, the living contingent beneficiaries on the one hand, and the estate of the principal beneficiary on the other.

2. *The delay in making payment to Mrs. Short was regrettable but unavoidable and cannot change the legal effect of the regulation.* The distinguished district judge stated in his opinion:

> I cannot believe that Congress intended that the rights of the principal beneficiary could be defeated by an administrative failure to pay or by litigation over the proceeds extending beyond that beneficiary's death.

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[8] This same policy against vesting (which is merely an extension of the policy favoring living persons) was followed under Section 602(h)(3) of the 1940 Act. See pp. 8-9, *supra*.

Almost the identical reasoning was rejected by the Supreme Court in *United States* v. *Henning,* 344 U.S. 66 at 74. In that case the Court said (at pp. 75-76):

> We are not unmindful of the fact that unanticipated delay in the payment of policy proceeds may withhold from a beneficiary the funds that Congress intended him to get; seven years and three deaths have not yet brought this litigation to an end. But we cannot apportion the blame for this cruel delay. And we may surely not speculate that the officials entrusted with the administration of the Act would attempt to enrich other beneficiaries or the treasury itself by a sardonic waiting game.
>
> We conclude that in this crisis legislation Congress, fully aware of the sometimes inevitable delays in payment, preferred the occasionally harsh result to a course of action which would permit funds intended for living members of the narrow statutory class of permissible takers to seep down to an enlarged class of sub-beneficiaries created not by the Act itself but by intended beneficiaries' testamentary plans. Courts may not flout so unmistakable a legislative purpose, expressed in so clear a congressional command.

The District Court distinguished the *Henning* case on this point upon the ground that it was based on "explicit provisions" of the 1940 Act and upon the legislative policy of restricting beneficiaries' rights, broadened by the 1946 amendments. But as we have seen above, that policy was broadened only with respect to beneficiaries entitled to lump-sum payment, and as for the "explicit provisions" of the Act, suffice it to say that two lower courts did not think the provisions were very explicit [9] having decided the case the other ~~say that two lower courts did not think~~ the provisions "ambiguous." 334 U.S. at 610.

In *United States* v. *Citizens Loan & Trust Company*, 316 U.S. 209, 215, the Supreme Court was faced with a similar problem involving administrative delay under the World War Veterans' Act of 1924. The court there said:

> The Court of Appeals was evidently impressed by the delay in the settlement of respondent's claim. We share that concern. The insured died almost 23 years ago and final disposition of the case is only now in view. But responsibility for the delay is not easily apportioned. And in any event, it could not influence our construction of the language of the statute. [Footnote omitted]

These decisions make it plain therefore that although the result in a particular case may be harsh,[10] the delay necessitated by administrative problems in an agency handling the vast numbers of applicants and the huge amounts of money that the Veterans Administration

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[9] See pp. 20-1, *supra*.

[10] The apparent harshness caused by delay in this case is of course not nearly so great as existed in the *Henning* case where the family of the insured was deprived of any proceeds in favor of the Government Fund. In this case the results of the delay (about 9 months) was to deprive Mrs. Short, the insured's mother, of the use of $2600 (see n. 2, *supra*) during the last months of her life. However, even under the Veterans Administration's ruling in this case, half of that amount would remain in the family, going to James Harvey Short, the insured's brother. The other half would be paid to Berkshire Industrial Farm, a charitable institution in New York. The insured had apparently become interested in this farm and had designated it as a contingent beneficiary under his National Service Life Insurance policy (R. 100).

handles cannot alter the construction of a statute or the applicability of regulations promulgated by the Administrator. Of course, the delay in this case was not a result of any deliberate intent to deprive Mrs. Short of the insurance proceeds but was caused by difficulty in obtaining certification of the insured's death. Although requests were made to the appropriate agencies by the Veterans Administration the official certification of death was not received from the State Department until July, 1951, a month after Mrs. Short had died. Until that certificate arrived, the Veterans Administration's rules would permit it to do nothing to process Mrs. Short's claim.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed.

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